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No. 08-927

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

S. E., *et al.*,

Petitioners,

v.

GRANT COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether the Sixth Circuit erred in finding that Assistant Principal Jim Lacey's questioning of A.E. for a reported violation of a school rule complied with the requirements of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and consequently did not violate A.E.'s Fourth and Fifth Amendment rights?

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PROCEEDINGS BELOW

Petitioners initiated their claims in the United States District Court for the Eastern District of Kentucky. After the parties completed discovery, both Petitioners and Respondents filed motions for summary judgment. Petitioners sought partial summary judgment, abandoning Counts I, II, VII, VIII, XI, XIII, XIV and XV of their Complaint. Their remaining claims sought relief under 29 U.S.C. §794, §504 of the Rehabilitation Act (Count III); the Fourth Amendment right to be free from unreasonable searches and seizures (Count IV); the Fifth Amendment right not to incriminate oneself (Count V); a §1983 claim of conspiracy to commit the above violations (Count VI); and a §1983 claim of refusing or neglecting to prevent the above violations (Count IX). Counts X and XII of Petitioners' Complaint asserted state law negligence claims.

Respondents sought summary judgment on all claims asserted against them, specifically arguing that the Fourth and Fifth Amendments do not provide a student constitutional protections when school administrators are imposing discipline for violations of school rules in the course and scope of their duties. Respondents also addressed the remaining substantive claims asserted against them, including the state law claims.

At oral argument, the trial court asked the parties to brief the issue of whether *Heck v. Humphrey*, 512 U.S. 477 (1994) applied to bar Petitioners' claims, an issue that neither party relied on in seeking summary

judgment. The lower court also ruled that all of the individual defendants would be entitled to qualified immunity on any claims that survived summary judgment. The parties provided their respective positions on *Heck*, and submitted the matter to the court for decision.

The trial court granted summary judgment to Respondents on all remaining claims asserted against them, on the basis that *Heck* barred the claims. The trial court did not address the substantive arguments asserted by Respondents in support of summary judgment, relying solely on *Heck* to dismiss the federal claims. It also dismissed the pending state law claims without prejudice.

Petitioners appealed to the Sixth Circuit Court of Appeals, arguing that *Heck* did not bar their claims, and that the constitutional violations they alleged entitled them to relief. They also argued that the facts of this case excused them from exhausting administrative remedies for the alleged violations of §504. Notably, in their appeal to the Sixth Circuit, Petitioners adopted in their entirety the factual findings made by the trial court in reaching its summary judgment decision. In response, Respondents argued in support of the trial court's decision based not only upon its reading of *Heck*, but also on the basis of the substantive arguments they made to the trial court in support of their summary judgment motion that the trial court declined to address.

In a 3 - 0 decision, the Sixth Circuit rejected the trial court's *Heck* analysis, holding that it was inapplicable to the facts of this case. However, it also

ruled that the trial court correctly granted summary judgment to Respondents. The appeals court found that no constitutional violations occurred when the school district's middle school vice-principal interviewed both the student who shared one of her prescription pills with another student and the student who received the pill, meting out the same school discipline to each of them, and referring each student to the district's Resource Officer, a local sheriff's deputy. The Sixth Circuit also upheld the summary judgment decision on Petitioners' §504 claim, determining that Petitioners' failure to exhaust administrative remedies before filing suit was fatal to that claim.

The Sixth Circuit denied the Petition for a Rehearing, and Petitioners filed the pending Petition for Writ of Certiorari, seeking review only on their claims under the Fourth and Fifth Amendments to the U. S. Constitution, specifically abandoning their claim under 29 U.S.C. §794, §504 of the Rehabilitation Act.

COUNTERSTATEMENT OF THE CASE

On the last day of the 2004 – 2005 school year, school nurse Celisa Edmondson returned several Aderall pills to A.E. that were not dispensed during the school year. Students had already cleared their lockers, and turned in all their books and materials. A.E. carried the pills with her for the remainder of the day, except for one class period when she asked a teacher to hold them while she participated in outside activities. During the last period of the day, A.E.'s class watched a movie and ate snacks. Another student saw A.E.'s pills and asked her what they were. A.E. told her that they were her

"focus" medicine. The other student asked A.E. to give her one. At first, A.E. said no, but eventually gave the other student one of her pills.

The other student's parents learned of this incident that same evening, and reported it to school officials. Middle school principal Jim Lacey called A.E.'s parents, and told them that a police officer would contact them over the summer about the incident. However, the School Resource Officer (SRO) had surgery that summer, and no law enforcement investigation was conducted. When school resumed in August, Mr. Lacey called both girls into his office and obtained written statements from them concerning what had happened on the last day of the previous school year. Based on those statements, in which each girl admitted the material facts of the incident, Mr. Lacey suspended each of them from school for one day for their violation of a published school rule. Despite Petitioners' assertions to the contrary, Mr. Lacey's job responsibilities included investigating reported violations of school rules, a duty he carried out in this case. Since the incident involved drugs, he also gave the statements to the SRO, as he was required to do by KRS §§158.154 and 158.155.

After reviewing the statements, the SRO consulted with the Court Designated Worker (CDW) of the Grant County Juvenile Court, and A.E. subsequently was charged with trafficking controlled substances within 1000 feet of school property. After court personnel met with A.E., her parents and A.E.'s criminal defense attorney, the charge was diverted, and upon A.E.'s successful completion of certain steps required by the court, the charge was dismissed. While Officer Osborne

also referred the student who accepted a pill from A.E. to juvenile court, no charges were brought against her. None of the school district's personnel named in this litigation, including Mr. Lacey, participated in the juvenile court action in any manner, including the court's charging decision or its disposition of the case.

No other school disciplinary measures were imposed on either student for this or any other incident during the 2005 - 2006 school year. However, A.E. claims that the trauma of being charged with a crime and her participation in drug counseling classes ordered by the juvenile court caused her great emotional distress and physical problems. Prior to the incidents giving rise to this Complaint, A.E. was diagnosed as bipolar and suffering with ADHD. During her eighth grade year, A.E. was placed on homebound services and subsequently withdrew from the Grant County Schools in order to be home schooled.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Court of Appeals correctly applied applicable precedent in holding that the Fourth Amendment to the United States Constitution does not require school administrators investigating student violations of school rules to fully comply with constitutional protections required of law enforcement personnel, even if the student's conduct is also a potential violation of state criminal law.

In their first argument in support of their Petition for Certiorari, Petitioners argue that the Sixth Circuit erred in finding that Vice Principal Lacey acted reasonably when he detained and obtained a statement from a student, even when he reported the student's violation of a school rule to the District's SRO since the conduct also appeared to be a violation of Kentucky's drug laws. *S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633, 641 (6th Cir. 2008). Petitioners acknowledge that Mr. Lacey's report to the SRO was required by state law, i.e., KRS §§158.154 and 158.155. They incorrectly argue, however, that Mr. Lacey admitted he did not have a school discipline-related purposes in interviewing the two students involved in the pill-exchange incident, an assertion not supported by the record below. In fact, as the Sixth Circuit noted, Mr. Lacey imposed a one-day suspension from school on the students. *Id.* at 636. And, contrary to Petitioners' assertions, the Sixth Circuit did not ignore the fact that A.E.'s written statement was not placed in her school file and that her suspension did not take place until one week after she wrote the statement. The Sixth Circuit specifically acknowledged

these facts, before holding that Mr. Lacey's conduct was not undertaken at the behest of law enforcement or that it was otherwise unreasonable. *Id.* at 640-641.

In attempting to construct a federal constitutional violation arising out of Mr. Lacey's conduct worthy of this Court's review, Petitioners provide a list of statutes of other states requiring reports to law enforcement personnel under varying circumstances. However, they do not provide any reason that this Court should accept review based upon these similar statutes. Instead, they argue that the Sixth Circuit erred by determining that it was reasonable for Mr. Lacey, and by extension school personnel in other states, to report criminal behavior to law enforcement officials if conduct occurring in their schools violates both school rules and provisions of the states' criminal codes.

However, the law to be applied in this case is not whether it is reasonable for school administrators to comply with a state law requiring them to report potential violations of state criminal law to law enforcement officials when the offending conduct also is a violation of a school rule. The constitutional issue that must be decided by this Court is whether it was reasonable for Mr. Lacey to detain A.E. and obtain a statement from her about her involvement in a pill exchange incident that came to the school's attention as a result of a parent complaint.

The "reasonableness" test in evaluating whether school official searches of students pass constitutional muster has its genesis in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). As this Court, "the legality of a search of a

student should depend simply on the reasonableness, under all the circumstances, of the search." *Id.* at 341. Since there is no dispute that A.E. engaged in conduct that triggered a parent's complaint, prompting both Mr. Lacey's investigation and the subsequent juvenile court charges, the Sixth Circuit concluded that Mr. Lacey's conduct was reasonable, and not a violation of the Fourth Amendment rights of A.E. and other students.

The law upon which the Sixth Circuit relied is not in conflict. " '[A] school official may detain a student if there is a reasonable basis for believing that the pupil has violated the law or a school rule.' " *S.E., et al. v. Grant County Board of Education, et al.*, 544 F.3d 633, 641 (6th Cir. 2008), citing *Wofford v. Evans*, 390 F.3d 318, 326 (4th Cir. 2004). Furthermore, "that detention must be 'reasonably related in scope to the circumstances which justified [it] in the first place.' " *Id.*, citing [*Wofford* 390 F.3d] at 326-27 (citing *T.L.O.*, 469 U.S. at 341)(quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). In each instance, the determination of reasonableness is very fact-specific. *S.E.*, 544 F.3d at 641; *Thompson v. Carthage School Dist.*, 87 F.3d 979, 982 (8th Cir. 1996). The Sixth Circuit correctly determined that Petitioners did not provide sufficient proof to find that Mr. Lacey's conduct did not comply with the above directives and, thus, agreed that he did not violate A.E.'s Fourth Amendment rights, particularly in light of the fact that he did not act at the behest of police.

Petitioners argue that the circuit courts are inconsistent in their application of the reasonableness test as it applies to searches and seizures of students by school administrators. In support of this assertion,

they cite three separate decisions from different circuits that apply the reasonableness test in upholding school searches and seizures of students, albeit from different perspectives based on the unique facts and circumstances of those particular cases. Each decision, though, relies on the *T.L.O.* analysis, confirming that case as the universal touchstone for evaluating such claims.

In *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075 (5th Cir. 1995), the court cited *T.L.O.* in determining that the temporary seizure of a student that occurred on a school field trip was reasonable in light of the teacher/chaperones' duties to ensure the safety of all of the students in their care, as well as that of the youths residing in the juvenile detention center the students were visiting. *Id.* at 1079-1080. In reaching its decision on the reasonableness of the seizure, the court evaluated the seizure both at its inception (when the student was misbehaving) and in its scope, as directed to do so by *T.L.O.*

Similarly, in *Doe v. Haw. Dept. of Educ.*, 334 F.3d 906 (9th Cir. 2003), the court found that a school official's seizure of an eight-year-old student by duct taping his head to a tree was not justified pursuant to *T.L.O.* since the circumstances under which the court evaluated the student restraint took into account the "educational objectives" the school personnel were trying to achieve at the time of the restraint. *Id.* at 909, relying on *T.L.O.*, 469 U.S. at 341-42. The *Doe* court further cited *T.L.O.* in support of its conclusion that the seizure at issue in that case was not reasonable in light of all of these circumstances, including the educational objective,

"the age and sex of the student, and the nature of the infraction." *Doe*, 334 F.3d at 909, citing *T.L.O.*, 469 U.S. at 342.

Finally, in *Couture v. Bd. of Educ. of the Albuquerque Pub. Schs.*, 535 F.3d 1243 (10th Cir. 2008), the court determined, without citing *T.L.O.*, that "context" is "critical to reasonableness analysis[.]" *Id.* at 1251. The 10th Circuit's approach is not only consistent with the other cases cited by Petitioners and discussed above, but with this Court's mandate for evaluating searches and seizures by school officials articulated in *T.L.O.*, and provides no rationale for granting *certiorari* in this case. Clearly, there is no conflict among the circuits regarding application of the "reasonableness" test.

Petitioners argue that no court has ruled on the issue of whether a seizure of a student is reasonable when the school administrator's purpose for seizing the student is to "extract a confession" for use by law enforcement officials. Putting aside the fact that Petitioners' hypothetical does not reflect the factual record in this case, their legal assertion is incomplete.

In *New Hampshire v. Tinkham*, 719 A.2d 580 (N.H. 1998), the court explained,

> Although school principals are "responsible for administration and discipline within the school," and "must regularly conduct inquiries concerning both violations of school rules and violations of law," they are not law enforcement agents. They are "neither trained nor

> equipped to conduct police investigations," and, unlike law enforcement agents, enforcing the law is not their primary mission.

Id. at 583. The court affirmed a trial court decision to not suppress a statement given to school officials by a student who was subsequently charged and convicted of selling drugs. The court reached this conclusion, even though "the school administrators had every intention of turning the marihuana over to the police," concluding that the school officials were not "agents or instrumentalities of the police in questioning [defendant]." *Id.* at 584, citing *Com. v. Snyder*, 597 N.E.2d, 1368, 1369 (Mass. 1992). *See also, Thompson*, 87 F.3d at 982 (exclusionary rule does not apply to school disciplinary hearings).

Petitioners do no dispute that A.E. committed the acts that constituted both a violation of a school rule and a possible violation of state criminal law. Mr. Lacey learned of the incident from a parent of the student who took one of A.E.'s pills, and had no discretion to ignore the report. Thus, there is no doubt that Mr. Lacey's questioning of A.E. was reasonable at its inception, narrow in scope in that it only addressed the complaint and violation, and not overly intrusive on any legitimate privacy right retained by A.E. while attending school.

Furthermore, in *Milligan v. City of Slidell*, 226 F.3d 652 (5th Cir. 2000), cited by Petitioners to argue that the Fifth Circuit reversed itself by backing away from the reasonableness standard of *Hassan* when evaluating a seizure of a student by school officials, the court found no Fourth Amendment violation. *Id.* at 656. In *Milligan*,

students sued the city of Slidell and certain of its police officers after they were summoned to a vice principal's office to be questioned by the officers about rumors that an after-school fight was to take place. *Id.* at 655. While the vice principal remained in her office while the questioning took place, neither she nor any other school official participated further in the questioning. *Id.* at 655-656. Petitioners' citation of language purportedly calling into question the scope of a student's privacy right not to be called into a school official's office for questioning was refuted by the court itself.

> Indeed, any such right of unhindered attendance is logically inconsistent with the mandate of compulsory attendance and a structured curriculum, and it hardly squares with the schools' obligation to 'inculcate the habits and manners of civility. . . .'

Id. at 655, citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 106 S.Ct. 3159, 3163, 92 L.Ed.2d 549 (1986).

For all of the above reasons, it is apparent that the decision of the Sixth Circuit and its "reasonableness" analysis is entirely consistent with *T.L.O.* and the decisions of other circuit courts applying the holding of that landmark decision. There is no reason for further review by this Court. Petitioners have not provided any evidence that the Sixth Circuit's decision affirming the trial court's summary judgment decision in favor of Respondents must be further reviewed by this Court due to its inconsistency with prior decisions of this Court or its conflict with decisions of other circuits under similar facts.

II. The Sixth Circuit Court of Appeals applied applicable federal precedent consistent with the other circuits in holding that the Fifth Amendment to the United States Constitution does not require school administrators to provide *Miranda* warnings to students when investigating the student's violations of school rules, even if the student's conduct is also a potential violation of state criminal law.

Petitioners' repetition of their claim that Vice Principal Lacey of the Grant County Schools was acting as an agent of the police when he questioned A.E. about a violation of a school rule does not turn their misstatement into a fact that would benefit Petitioners' Fifth Amendment. Mr. Lacey questioned A.E. and another student about the sharing of A.E.'s pills between them. The questioning took place in his office, and no law enforcement personnel were present. No police agency asked Mr. Lacey to conduct the interview. Indeed, the interview was prompted by the complaint of a parent. Both students admitted their participation in this pill exchange, and Mr. Lacey imposed identical school discipline on them for violation of a school rule prohibiting the sharing of prescription medicine by students.

Petitioners ask this Court to grant the petition in order to consider whether an interrogation by a school administrator on school premises triggers the Fifth Amendment's *Miranda* protections. The Court cannot even reach the substance of this question without first deciding that a failure to give a *Miranda* admonition in itself creates a constitutional deprivation that can be

addressed in a §1983. There is no authority that Respondents can find that would support such a ruling.

In *Bennett v. Passic*, 545 F.2d 1260 (10th Cir.1976), the court rejected a §1983 claim based upon failure of the police to warn a plaintiff of his *Miranda* rights before a custodial interrogation:

> The Constitution and laws of the United States do not guarantee [the plaintiff] the right to *Miranda* warnings. They only guarantee him the right to be free from self-incrimination. The *Miranda* decision does not even suggest that police officers who fail to advise an arrested person of his rights are subject to civil liability; it requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence. No rational argument can be made in support of the notion that the failure to give *Miranda* warnings subjects a police officer to liability under the Civil Rights Act.

Id. at 1263; *and see, Craig v. St. Martin Parish Sheriff*, 861 F.Supp. 1290, 1298 (W.D.La. 1994) ("Under the Fifth Amendment, . . . a detainee subject to custodial interrogations has the right to counsel. However, the remedy for a violation of the suspect's *Miranda* rights is the exclusion from evidence of any compelled self-incrimination, not a civil rights action under 42 U.S.C. §1983."). (Citations omitted). Thus, if this question is to be addressed by this Court, it should come via an appeal of a delinquency adjudication or criminal conviction.

Because he was required to do so by state law, Mr. Lacey reported the incident to the School District's SRO and gave her the statements written by both students. Ultimately, this resulted in a charge being filed against A.E. in juvenile court. Once Mr. Lacey reported the incident to the SRO, he had no further involvement in the case, including the charging decision and the resolution of the charge in juvenile court. Importantly, A.E. agreed to participate in a court diversion program. Upon her successful completion of that program, the charge was dismissed. At no point during the juvenile court proceedings did A.E., her parents, or her criminal defense attorney challenge the use of her statement as a factor of her adjudication in court.

The great weight of authority does not require school officials who question students to give those students a *Miranda* warning prior to questioning them about a violation of a school rule that also might constitute a violation of a civil law.[1] The primary basis for this conclusion is that school officials are not law enforcement officers. *People v. Pankhurst*, 848 N.E.2d 628, 636 (Ill. App. 2006); *J.D. v. Comm.*, 591 S.E.2d 721, 725 (Va. App. 2004) (school official not acting as law enforcement officer when questioning a student about

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1. Respondents agree with Petitioners that the legal authority for weighing a challenge to school administrator conduct pursuant to the requirements of the Fifth Amendment are state court decisions arising out of adjudications of youth in each state's juvenile justice system. Respondents suggest that the absence of federal civil decisions resulting from §1983 actions challenging the questioning of students by school administrators is an indication that this area of the law is well-settled.

school thefts even though police officer present during questioning); *Tinkham*, 719 A.2d at 583 – 584 (school official did not have to give *Miranda* warning prior to questioning a student since no evidence that police directed investigation by administrator); *Snyder*, 597 N.E.2d at 1369 ("Miranda rule does not apply to . . . school administrator who is acting neither as an instrument of the police nor as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile."); *In re Harold S.*, 731 A.2d 265, 267 (R.I. 1999); *In the Matter of: Krystal Nicole Phillips*, 497 S.E.2d 292, 294 (N.C. App. 1998); *In the Matter of Appeal in Navajo County Juvenile*, 901 P.2d 1247, 1249 (Ariz. App. Div. 1 1995).

The decision in *State v. V.C. and R.S.*, 600 So.2d 1280 (Fla. App. 3 Dist. 1992) is both in accord with the above decisions, as well as most directly on point with the facts of this case. In *V.C.*, the assistant principal undertook an investigation into a student report that two other students whom he could identify robbed him. The assistant principal questioned both students individually and informed each of them that a police investigation also would be conducted. Both students admitted their involvement in the robbery to the assistant principal, and provided him a written statement describing their involvement. After the students were arrested, the assistant principal gave the students' statements to the local police.

During their prosecution, the students moved to suppress their statements. The trial court granted the motion, but on appeal, that decision was reversed. Relying on the *T.L.O.* reasonableness test, the appeals

court held that the assistant principal's conduct was not "overbearing" or that there was any evidence that he "did anything to extract the students' confessions that was incompatible with our constitutional principles." *Id.* at 1281. Responding to the students' argument that they were in custody when the assistant principal obtained their statements, the appeals court found that "[a]lthough they were not free to leave, that restriction stemmed from their status as students and not from their status as suspects." *Id.*

The Florida appeals court also found that there was no evidence that the assistant principal acted as an agent of law enforcement when conducting his investigation. As the court stated,

> Hindman testified that, as an assistant principal, he had to deal with students disciplinary problems and that the investigations he conducted within the school system often yielded information that he would eventually turn over to the police. However, his primary function when dealing with disciplinary problems was to act as a fact-finder for the school system. Hindman's testimony reveals that he was acting to further the interests of the school, not the police.

Id.

In this case, Vice Principal Lacey questioned each student in his office. No law enforcement officer was present. After each student admitted her participation

in the alleged misconduct, Mr. Lacey suspended each of them for one day for violating a school rule. He then referred the matter to the District's SRO since the misconduct involved drugs. From that point on, Mr. Lacey had no involvement in the referral of the case to the local juvenile court or with the decisions made regarding the appropriate charge or ultimate disposition of the case. There are no facts of record to support Petitioners' claim that Mr. Lacey acted as a police agent when he investigated a violation of a school rule. Accordingly, Mr. Lacey was under no legal requirement to provide A.E. a *Miranda* warning. His subsequent referral of this matter to local law enforcement officials was reasonable once he understood the full nature of the student's misconduct, particularly in light of a state statute mandating this report.[2] Consequently, Mr. Lacey did not violate A.E.'s rights under the Fifth Amendment.

Three cases cited by Petitioners in support of their argument are factually distinguishable from this case. In *Killitz v. State*, 651 P.2d 1382 (Or. App. 1982), the appeals court reversed the trial court's finding that a student committed the act with which he had been

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2. Respondents remind this Court that Mr. Lacey told A.E.'s mother in the early summer that he had contacted law enforcement about the parent's complaint, and that she should expect someone from law enforcement to be in contact with her over the summer about the incident. Thus, it should not have been a surprise to Petitioners when this referral resulted in juvenile court charges, albeit later than had been originally anticipated.

charged. The court correctly stated the issue on appeal as follows:

> If he was in custody, the statements are not admissible, because he was not advised of his rights before the interrogation began. If he was not in custody, the statements are admissible.

Id. at 722.

Contrary to the facts and circumstances of the questioning of A.E., the student Killitz had been summoned to the principal's office to be questioned by a uniformed and armed police officer about a reported burglary. The school's principal was present, but did not take part in the questioning of the student. The police officer did not inform the student of his *Miranda* rights before the questioning began. Under these facts the court held that the student was in custody and should have been informed of his Fifth Amendment rights prior to the questioning by the officer.

A.E. was not in custody, as contemplated by *T.L.O.*, when she was required to report to Mr. Lacey's office during his investigation of a reported violation of a school rule. Rather, A.E.'s status is identical to that of the students in *V.S.* who were required to comply with the assistant principal's detention of them while he questioned them about a possible violation of a school rule. Since A.E. was not in custody, Mr. Lacey was not required to give her a *Miranda* warning prior to asking her about her involvement in the pill exchange incident.

In *State v. M.A.L.*, 765 P.2d 787 (Okla. Crim. App. 1988), both the facts and the applicable state law are distinguishable from the case at bar. Oklahoma law requires that evidence obtained from a child who is interviewed by a law enforcement officer or investigative agency outside the presence of a parent, guardian, attorney or legal custodian is inadmissible at a subsequent court hearing. *Id.* at 789, citing 10 O.S.Supp., 1986 §1109(a). Neither the police officer nor school's assistant principal complied with this statute when questioning a student about a series of school burglaries. According to the Oklahoma court, the above referenced statute "expands upon the rights of juveniles granted by the U.S. Constitution and the Oklahoma Constitution. Therefore, the fact that M.A.L. was not in custody has no bearing upon the application of the statute in the instant case." *Id.* at 790. Since *M.A.L.* relies on rights granted by a state statute, it provides no guidance for the Fifth Amendment question presented by Petitioners here. Moreover, the court also found that the assistant principal was acting as an agent of law enforcement when he questioned M.A.L. about the burglaries. *Id.* Consequently, Oklahoma's statute required the suppression of a confession given to the police officer and to the assistant principal.

Kentucky enacted a similar statute with one important and controlling distinction. In KRS §610.200(1), the Commonwealth specifically prohibits only a peace officer" from questioning a child who is in his custody until the child's parent, guardian or other custodian is informed of the fact that the child is in police custody and the reason for the child's detention. This statute places no restrictions on other persons who may

be interviewing a child about possible violations of the law, or as applied to this case, school rules. Additionally, since A.E. did not challenge the use of her statement to Mr. Lacey in bringing the juvenile court charge against her, a court did not make a finding that Mr. Lacey was acting as an agent of law enforcement when he questioned A.E. about her involvement in the pill-exchange incident. Thus, the *M.A.L.* decision provides no support for the relief sought by Petitioners.

Finally, *New Hampshire v. Heirtzler*, 789 A.2d 634 (N.H. 2001) upheld the suppression of the student's statement since it was obtained by a school official that the court found acted as an agent of the police. The evidence adduced in this case established that the school district and the local law enforcement agency reached an agreement regarding responsibility for investigating minor versus potentially major violations of the law. The decision-maker was the SRO, who acknowledged that he screened cases presented him for investigation as to their potential seriousness. *Id.* at 637. The SRO agreed that this arrangement enabled him to obtain evidence on potential crimes without the necessity of granting students subject to investigation all of the constitutional rights they might otherwise possess. *Id.*

No such evidence was developed here. The closest fact to those present in *Heirtzler* is that SRO Osborne knew that school officials routinely asked students who were the targets of a school investigation to write statements concerning their involvement. Grant County school officials shared these statements with her, so she could make an independent determination of whether a crime had occurred. However, there is no evidence that

this practice came about as the result of an agreement between law enforcement and school officials to avoid the restraints of constitutional protections afforded students, nor has any court made that determination. Without this evidence, there is no reason to grant *certiorari* on A.E.'s Fifth Amendment claim.

The *Thompson* decision, cited above, provides helpful guidance on this issue, as well.

> The societal costs of applying the [exclusionary] rule in school disciplinary proceedings are very high. For example, the exclusionary rule might bar a high school from expelling a student who confessed to killing a classmate on campus if his confession was not preceded by *Miranda* warnings. We doubt that any parent would compromise school safety in this fashion. To the extent the exclusionary rule prevents the discipline of students who disrupt education or endanger other students, it frustrates the critical governmental functions of educating and protecting children.

Thompson, 87 F.3d at 981.

This rule applied to Mr. Lacey when he was investigating a report of student misconduct in response to a parent complaint and imposing discipline for violations of school rules. In doing so, he did not violate the Fifth Amendment rights of A.E., and this Court should deny Petitioners' request for review of that claim.

CONCLUSION

Neither the facts giving rise to this Petition for Certiorari nor the applicable law with respect to students' rights under the Fourth and Fifth Amendments when being questioned by school administrators require this Court to accept review of this case. The Petition should be denied.

Respectfully submitted,

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